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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

CITY OF ROME, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS CITY OF ROME, ET AL., AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS CITY OF ROME, ET AL.

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Pursuant to Supreme Court Rule 42, Pacific Legal Foundation respectfully moves this Court for leave to file the attached amicus curiae brief in support of appellants City of Rome, *et al.* Consent to the filing of this brief has been granted by the City of Rome, *et al.*, and has been lodged with the Clerk of this Court. Appellees United States, *et al.*, have withheld their consent, but have indicated that they will not oppose this motion.

Pacific Legal Foundation is a nonprofit, tax-exempt organization, incorporated under the laws of California, formed for the purpose of engaging in litigation in matters affecting the public interest. The Foundation has over 7,000 supporters and

contributors throughout the United States, many of whom reside in areas potentially subject to the statute at issue in this case. For this reason, the Foundation submits that it can add a broader perspective to this case which would aid the Court.

Pacific Legal Foundation believes that the federal government has broad authority under the Constitution and various statutes to eliminate racial discrimination. However, local governments should be restricted by this federal power only when circumstances compel such restriction and only when the facts justify it. Intrusion on the basic processes of localities can be justified by no less. In this particular case, a District Court has held that a 1% change in voting strength, which occurred without discriminatory purpose and which produced no change in voting balance, nonetheless triggered the harsh sanctions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, thereby subjecting a city's basic political processes to federal interference. This result is justified neither by precedent nor by common sense.

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States District Court for the District of Columbia, sitting as a three-judge court, was issued on April 9, 1979, and has not yet been published. *City of Rome v. United States,* No. 77-0797 (D.D.C. April 9, 1979). It is reprinted in Appellants' Jurisdictional Statement at 3b (hereinafter Opinion Below).

INTRODUCTION

The District Court refused to grant a declaratory judgment that, *inter alia,* 13 annexations made by Rome, Georgia, were without discriminatory purpose or effect under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The focus of this brief will be the Court's determination that these annexations "significantly alter[ed]" Rome's racial balance to the detriment of black voters. Opinion Below at 49b. The Court made this determination despite the undisputed fact, acknowledged by the Court, that these annexations were not motivated by any discriminatory purpose. *Id.* It was solely the numerical impact of these annexations which, according to the Court, required the imposition of sanctions under Section 5. Yet, as will be shown, the annexations in fact produced no more than a 1% reduction in the existing black minority vote.

The result of the Court's finding was to trigger the sanctions of Section 5. The potential scope of these sanctions is huge, ranging from judicial annulment of municipal annexations to the actual enjoinment of all local elections and referenda. Section 5 sanctions thus clearly affect functions which are basic to local government and lie at the heart of local autonomy.

Under the District Court's interpretation of Section 5, the most innocent of annexations, producing the most minimal of impacts upon racial voting strength, could nonetheless force a municipality to adopt judicially imposed conditions before it may resume normal political life. This result cannot be justified.

Before considering why precedent and policy reveal this determination to be erroneous, a brief review of the facts pertaining to the annexations is necessary. The 13 disputed annexations occurred during the ten-year period between November 1, 1964 (the effective date of Section 5), and February 10, 1975 (the date on which all annexations made by Rome after November 1, 1964, were submitted to the Attorney General). Opinion Below at 15b n.44.

Nine of the 13 annexations added no population to Rome at their inception. Initially, therefore, they were merely boundary changes and had no effect on Rome's racial balance. By February, 1978, however, 476 registered white voters and three registered black voters were living in these areas. Table, *id.* at 52b n.99.

The other four annexations initially added 288 registered white voters and no registered black voters. By February, 1978, these four areas had contributed 347 registered white voters and six registered black voters to Rome's population. *Id.*

The District Court based its finding that the annexations significantly altered the racial balance of Rome on a comparison of the population of the annexed areas, broken down by race, to the total population of Rome post-annexation. The Court observed that while 823 registered white voters lived in the annexed areas as of February, 1978, out of a total registered white population of 10,982, only nine registered black voters lived in those areas out of a total registered black population of 2,026. A comparison of the ratio of 823 to 10,982, characterized by the Court as "close to 10%" (in actuality it is 7.5%), to

the ratio of 9 to 2,026 (.4%) convinced the Court that the "impact on black voting strength [was] significant." *Id.* at 53b-54b.

However, if one looks at the impact of the annexations on the *total* voting population in Rome, a different picture emerges. In 1975 the total number of registered voters in Rome was 13,008, consisting of 10,982 whites (84.4%) and 2,026 blacks (15.6%). *Id.* As of February, 1978, all 13 annexed areas contained 823 registered whites and nine registered blacks. *Id.* at 53b. If one assumes that all of the annexations occurred in 1975, and the total population shift thus is reflected in the 1975 statistics, then the pre-1975, pre-annexation breakdown of total registered voters in Rome would be 10,159 whites (83.4%) and 2,017 blacks (16.6%). The change in Rome's racial composition caused by the annexations was thus, at most, *a 1% reduction of a black minority (from 16.6% to 15.6%) and a 1% addition to a white majority (from 83.4% to 84.4%)*. Yet this minimal change, which the Court found to be free of any discriminatory purpose, was held to constitute a discriminatory impact in violation of the Voting Rights Act.

ARGUMENT

I

A Municipal Annexation Which Does Not Significantly Alter a City's Racial Balance Does Not Have a Discriminatory Effect Under Section 5 of the Voting Rights Act

The annexations which this Court has found discriminatory have involved substantial changes in racial balance. In *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), the annexation effected "an almost complete reversal percentage-wise in [Petersburg's] racial

make-up." 354 F. Supp. at 1024. Before the annexation, Petersburg was 55% black and 45% white. After annexation, Petersburg was 46% black and 54% white. The premise upon which the District Court, and this Court by its affirmance, found discriminatory effect was the "transformation of a potential black voting majority into a clear minority" in the context of racial bloc voting and the unresponsiveness of the white-dominated city government to local black needs and desires. *Id.* at 1025. The Attorney General, in disapproving the annexation, objected to Petersburg's readoption of an at-large election system "in the context of a *significant* change of population—from white to black majority." *Id.* at 1023 n.2. (emphasis added). The implication is that annexations which cause *insignificant* population changes are not discriminatory.

In *City of Richmond v. United States*, 422 U.S. 358 (1975), a disputed annexation effected a similar drastic change in the city's racial composition. Richmond's pre-annexation population was 52% black and 48% white; its post-annexation population, 42% black and 58% white. A small black majority was thus transformed into a definite black minority. The Supreme Court held this otherwise discriminatory annexation permissible *only* because Richmond had discarded its at-large voting system in favor of a ward system. *Id.* at 371-72.

In *Beer v. United States*, 425 U.S. 130 (1976), this Court clarified its *City of Richmond* holding:

> "[T]he [*City of Richmond*] Court had to decide under what circumstances § 5 would permit a city to annex additional territory when that annexation would have the effect of changing the city's Negro population from a majority into a minority.... The *City of Richmond* case thus decided when a change with an adverse impact on previous Negro voting power met the 'effect' standard of § 5." *Id.* at 139 n.11.

Implicit in such a formulation is the idea that there may be changes with adverse impact on previous black voting power which *do not* meet Section 5's effect test.

Indeed, the District Court in the instant case decided that an annexation must *significantly* reduce the proportion of voters of a particular race before it can be characterized as having a discriminatory effect. Opinion Below at 51b, 53b. It thus implicitly recognized the nondiscriminatory nature of an annexation which insignificantly reduces a racial group's voting strength. No court, in the history of judicial interpretation of Section 5, has decided to the contrary.

II

Rome's Annexation, Increasing White and Reducing Black Proportional Voting Strength by 1%, Did Not Effect a Significant Alteration of that City's Racial Balance

A. *A 1% Change in Voting Strength Which Did Not Cause a Shift of a Racial Majority to a Minority Was Not a Significant Alteration*

This Court has never held as discriminatory an annexation which did not result in the transformation of a black majority into a minority. The occurrence of such a transformation was emphasized as the salient factor in prior annexation cases decided by the Supreme Court. *City of Petersburg,* 354 F. Supp. at 1025, *aff'd,* 410 U.S. 962; *City of Richmond,* 422 U.S. at 372; *Beer,* 425 U.S. at 139 n.11.

The only case to consider the application of Section 5 to annexations which changed a city's racial composition without overturning the pre-annexation racial majority was *Perkins v. Matthews,* 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd on other grounds,* 400 U.S. 379 (1971), *on remand,* 336 F. Supp. 6 (S.D. Miss. 1971). Canton, Mississippi, through a series of annexations, had reduced but not eliminated a black voting majority. The District Court held that annexations which did not destroy black majorities were not violative of the Voting Rights Act. 301

F. Supp. at 567. On remand that Court noted: "Indeed, the Supreme Court recognized that this Court had found *no discriminatory purpose or effect* in the changes being litigated." 336 F. Supp. at 9 (emphasis added).

Rome's annexations changed its registered voting population from 83.4% white and 16.6% black to 84.4% white and 15.6% black. The pre-annexation racial majority did not shift; it was not even sizeably increased. Thus, as both the cases and the facts dictate, no significant alteration of the city's racial balance occurred.

B. *A 1% Change in Voting Strength Is a De Minimis Change and Not a Significant Alteration*

The methodology of the opinion below, holding a 1% addition to an already existing white voting majority discriminatory, was not based on any precedent. The Court simply compared the black and white voting populations in the annexed areas to their share of the total municipal electorate and arrived at a finding of significant alteration in Rome's racial balance. Opinion Below at 53b. Such a statistical method was rejected by the Supreme Court in *City of Richmond.* The Supreme Court stated:

> "We did *not* hold . . . that '[i]f the proportion of blacks in the new citizenry from the annexed area is appreciably less than the proportion of blacks living within the city's old boundaries . . . the voting power of black citizens as a class is diluted and thus abridged.'" *City of Richmond,* 422 U.S. at 368 (emphasis added) (citation omitted).

The *proper* comparison was whether "an annexation reduc[ed] the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation." *Id.* at 378.

The focus in an annexation case, as *City of Richmond* and *City of Petersburg* demonstrate, is not on the composition of the annexed areas but on that of *the total municipal unit* before and

after the annexation. The District Court stated the law properly when it noted that a discriminatory annexation must significantly reduce "the proportion of voters of a particular race." Opinion Below at 50b-51b. But the Court did not apply the law, failing even to calculate Rome's post-annexation racial composition. It is only by examining the pre- and post-annexation population figures in the context of a city's post-annexation political structure that a reasonable estimation of the effect on black voting strength can properly be made.

Had the District Court made such an examination, it would have been forced to conclude that the 1% shift was de minimis and therefore of negligible importance.[1] A 1% shift in certain narrow circumstances might be characterized as a significant alteration. If the racial voting blocs were evenly balanced prior to an annexation and a small addition in population gave one bloc an effective majority, then perhaps Section 5 could be properly applied to prevent the change. Here, however, a shift from an 83.4% to an 84.4% white voting majority, in the context of at-large elections, results in no practical dilution of black voting strength. It is difficult to imagine a situation in which any candidate's ability to be elected to municipal office would be significantly affected by such a change.

In the closely related area of reapportionment, it has been held that a claim of unconstitutional dilution of black or Hispanic voting strength is subject to a de minimis defense. In *Cousins v. City Council,* 503 F.2d 912 (7th Cir. 1974), *cert. denied,* 420 U.S. 992 (1975), the reapportionment of Chicago's wards was challenged on the grounds of racial and ethnic gerrymandering. The Court held that "a relatively small

[1] The District Court explicitly recognized the existence of a de minimis defense to Section 5: "[W]e will not treat these thirteen annexations as separate voting changes, in which case we would be compelled to sustain many of them as having *de minimis* effect only." Opinion Below at 53b. Had the District Court made the proper calculations, the cumulative impact of all the annexations would also have compelled a finding of de minimis effect.

reduction (2.5%) in the size of the approximately 30% black minority is insignificant as related to the issues here." 503 F.2d at 919. The Court also held that when a change in the territorial contours of an alderman's district resulted in the district having a 25% Puerto Rican population rather than one of 32%, that 7% difference was not "sufficiently substantial" to be a significant dilution of Puerto Rican voting strength. *Id.* at 921. The black population of the same district "would have increased only from approximately 1.4% to 1.7%" if the change had not been made. *Id.* The lower court's finding that "there was no significant diminution in black voting strength" was affirmed. *Id.*

Similarly, the one man, one vote rule, as interpreted by this Court, permits de minimis variations from absolute population equality in state and local legislative reapportionment. In *Abate v. Mundt,* 403 U.S. 182 (1971), a county reapportionment plan which deviated from population equality by 11.9% was upheld, this Court stating that "particular circumstances and needs of a local community ... may sometimes justify departures from strict equality." *Id.* at 185. In *Mahan v. Howell,* 410 U.S. 315 (1973), this Court held that a 16% deviation from population equality was constitutional since it was "based on legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 325, *quoting Reynolds v. Sims,* 377 U.S. 533, 579 (1964).[2]

[2] "Apart from those deviations from the one person, one vote standard that have been tolerated as *de minimis,* avoidable deviations have been sanctioned where designed to effectuate a substantive state policy deemed legitimate by the Court. Here, as was the case with the *de minimis* defense, different standards obtain with respect to state and local apportionment on the one hand and Congressional districting on the other." L. Tribe, *A Treatise on American Constitutional Law* 746 (1978).

Implicit in the existence of a different standard for state and local government is a notion of federal deference to legitimate state and local concerns. This Court has recently reaffirmed the constitutional principle that federal law may not supplant "functions essential to [a

(footnote continues)

C. *A 1% Change in Voting Strength Which Did Not Reduce a Minority's Political Effectiveness Was a Non-Retrogressive Change*

The Supreme Court put a further gloss on the meaning of discriminatory effect in Section 5 when it enunciated the non-retrogression rule in *Beer*. Under this rule, voting procedure changes which do not "lead to a retrogression" in the effective exercise of a racial minority's electoral franchise are permissible. *Beer*, 425 U.S. at 141. *Beer* cites the *City of Richmond* dissent, with apparent approval, for its assumption that "the fundamental objective of § 5 ... [is] the protection of *present* levels of voting *effectiveness* for the black population." *Beer*, 425 U.S. at 141 n.12, *quoting* 422 U.S. at 388 (latter emphasis added).

(footnote continued)

state's] separate and independent existence." *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976) (citation omitted). Municipal annexations fall within this class of functions:

> "A major purpose of annexation is to keep an entire urban area under the management of a single city government by extending city boundaries as fringe land is developed. Such unified management and planning of metropolitan regions permit services to be provided comprehensively with greater possible economy and may facilitate more effective land-use controls. In addition, certain types of urban malaise can be cured or controlled by annexation. These remedies include capturing the tax base which would otherwise be lost when new construction occurs on the city's fringe, eliminating 'tax colonies,' and curtailing the proliferation of cities which cause inequitable variations in service levels and tax rates." Lipsig, *Annexation Elections and the Right to Vote*, 20 U.C.L.A. L. Rev. 1093, 1093-94 (1973).

While the Fifteenth Amendment may supersede state and local autonomy in cases of blatant discrimination, the notions of federalism reflected in *Mahan v. Howell*, 410 U.S. 315 (1973), and *National League of Cities* dictate a restrained interpretation of federal power under that amendment where state and local governments have shown their actions to be without discriminatory purpose and without significant discriminatory impact.

The emphasis in *Beer* on comparisons of voting effectiveness before and after the challenged voting change is consistent with *City of Petersburg* and *City of Richmond*. It is important to note the distinction that while Section 5 protects the present level of voting effectiveness for the black population, it does not ensure that the present numerical level of the black population will remain constant. Section 5 does ensure that no voting change will be implemented that reduces a minority's effectiveness within its particular political environment. In *City of Richmond* and *City of Petersburg*, the combination of at-large electoral systems, the demonstrated unresponsiveness of the white-dominated governments to black concerns and pervasive racial bloc voting led this Court to conclude that the transformation of black majorities into minorities would significantly diminish their ability to achieve desired political results.

Rome's situation is dramatically different. The change in racial composition effected by Rome's annexations is de minimis. The District Court found that, while there was "a substantial measure of racial bloc voting" in Rome, the white officials *were* "responsive to the needs and interests of the black community." Opinion Below at 13b, 7b. The Court further noted:

> "[T]he facts recited by the Court in *City of Petersburg* reveal a far greater degree of racial polarization than is present in Rome's relatively benign racial atmosphere. And while Rome's elected officials have been quite responsive to the interests of the black community, the City Council of Petersburg was generally unresponsive to black needs." *Id.* at 55b.

The responsiveness of Rome's white elected officials to black concerns was established by a finding that the city had made an effort to upgrade black neighborhoods, had subsidized a city transit system that had a predominantly black ridership and had caused blacks to be employed on the city work force in

numbers approximately proportionate to their share of the population (including a number of blacks in skilled or supervisory positions). *Id.* at 7b-8b.

Given this political environment, in which a small black population has been successful in achieving moderate political objectives, it is unreasonable to believe that a tiny reduction in that population's voting strength would adversely affect its ability to achieve similar objectives in the future. The annexations, insofar as they reduced the proportional black vote by only 1% without adverse impact on the black community's political effectiveness, were non-retrogressive and thus non-discriminatory under Section 5.

CONCLUSION

The determination by the District Court that Rome's annexations had a discriminatory effect on black voting power in that city was erroneous. In basing its determination on a finding that a disproportionate number of Rome's white registered voters lived in the annexed areas as compared to the number of black voters who lived in those areas, the Court ignored Supreme Court precedent which mandated an examination of an annexation's effect upon the city's *total* population. The Court should have recognized that the enhancement of a white majority by 1%, increasing it from 83.4% to 84.4%, caused no significant alteration of Rome's racial balance. Instead, it was only a de minimis non-retrogressive alteration with no potential to significantly affect black voting power in Rome. The imposition of federal sanctions affecting basic local political processes cannot be based on such a miniscule impact unaccompanied by discriminatory intent.

For the reasons stated above, Pacific Legal Foundation urges the Court to reverse the decision of the District Court insofar as it pertains to Rome's annexations. The de minimis

impact on voting of these annexations, which were implemented for legitimate governmental reasons and without discriminatory purpose, should not trigger the sanctions of Section 5 of the Voting Rights Act.

Respectfully submitted,

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